

Hammoud (Migration) [2017] AATA 585 (4 April 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Nader Hammoud
CASE NUMBER:	1700976
DIBP REFERENCE(S):	BCC2015/3906721
MEMBER:	Kira Raif
DATE:	4 April 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 010 (Bridging A) visa.

Statement made on 04 April 2017 at 10:29am

CATCHWORDS

Migration – Cancellation – Bridging A (Class WA) visa – Subclass 010 (Bridging A) visa – Cancellation of automatically granted visa – Non-compliance in respect of expired Student visa – Incorrect answers and bogus documents in Student visa application – Loan statement not issued by bank – Procedural fairness requirements – Legal proceedings against bank

LEGISLATION

1. *Migration Act 1958*, ss 5, 101, 103, 107, 109, 140, Part 2 Division 3
Migration Regulation 1994, r 2.41

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 010 (Bridging A) visa under s.109(1) of the *Migration Act 1958* (the Act).
3. The applicant is a national of Lebanon, born in November 1994. He travelled to Australia holding a Student visa in July 2013. The applicant made an application for a further Student visa in July 2015 and was granted a Bridging A visa (BVA) in relation to that application. In December 2016 the applicant was issued with a Notice of Intention to Consider Cancellation (NOICC) of his Bridging A visa because the delegate found that the applicant did not comply with ss. 101 and 103 in relation to his previously held Student visa. The applicant provided his written response to the NOICC and his Bridging A visa was cancelled in January 2017. The applicant is seeking review of that decision.
4. The applicant appeared before the Tribunal on 4 April 2017 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Lebanese) and English languages. The applicant was represented in relation to the review by his registered migration agent.
5. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

RELEVANT LAW

6. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
7. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
8. Section 107A provides that possible non-compliances in connection with a previous visa may be grounds for cancellation of the current visa.

DID THE NOTICE COMPLY WITH THE REQUIREMENTS IN S.107?

9. Section 107 is only engaged if the Minister or delegate considers that the visa holder has not complied with one of the provisions mentioned in s.107(1). It is only then that the Minister or delegate is entitled to give notice to the visa holder under s.107. Therefore, if a notice is to be given under s.107, the Minister or delegate must have reached a state of mind where they consider that the visa holder has not complied with one or more of the relevant provisions.

10. The Tribunal has considered the validity of the NOICC. The Tribunal is satisfied that it contains sufficient particulars to enable the applicant to identify and address the issues and also that the delegate had reached the necessary state of mind to engage s.107.
11. In his response to the NOICC the applicant, through his migration agent, outlined a number of concerns with the NOICC which, he claims, render it invalid. The applicant argues that the delegate failed to cite evidence of any incorrect answers in relation to the application for the Bridging A visa and the applicant notes that he did not make an application for a Bridging A visa but was granted one as a consequence of having applied for a Student visa. The applicant argues that the bridging A visa did not come into effect until his old Student visa expired and there is no power to invoke the cancellation of any automatically granted bridging visa. The applicant repeated these claims in his submissions to the Tribunal.
12. The Tribunal considers these submissions to be misguided. Firstly, a bridging visa is not granted automatically and it is erroneous to state that he had not applied for it. Part 010 of Schedule 2 sets out the relevant criteria for the grant of the visa. The applicant made the application for that visa when he completed the prescribed application form, which included the application form in relation to the Student visa. He was assessed against the requirement set out in the Act and the Regulations and was granted that Bridging visa. The visa was not granted by operation of law or automatically as the applicant suggests, but as a result of a decision made by the delegate. Secondly, the fact that the Bridging visa did not come into effect until the previously held Student visa expired is of no consequence. The representative's submission that there is no basis to cancel such a visa fails to have regard to s. 107A of the Act which does expressly allow for cancellation due to non-compliances that occurred at any time, including non-compliances in respect of any previous visa held by the visa holder.
13. In his written submission to the delegate the applicant notes that his previously held Student visa expired in August 2015 and he claims that 'both logically and at law [it is] impossible to cancel a visa which no longer has any existence or validity'. Again, the Tribunal finds that shows a misunderstanding of the cancellation process. The NOICC and the ultimate cancellation relates to the Bridging A visa held by the applicant. There is no suggestion that the NOICC refers to the cancellation of the Student visa, and no attempt was ever made to cancel the previously held Student visa which expired in August 2015. Thus, the cancellation relates to the visa that was held by the applicant at the time the NOICC was issued and at the time the cancellation occurred. Section 107A provides a basis for such a cancellation, even if the breach occurred in relation to the visa held previously.
14. The same reasoning applies with respect to the representative's objection that the applicant made the application for a new Student visa and must meet a different set of criteria. The representative argues there is no nexus between the old expired Student visa and the new visa application which is yet to be decided. The Tribunal accepts that the two applications are entirely different but the cancellation does not in any way relate to the applicant's application for the new Student visa. It only relates to the Bridging A visa that the applicant held and what the delegate found to be a breach made in relation to the old Student visa application. There need not be any nexus between the previously held Student visa and the new visa application because the new visa application would be entirely unaffected by this cancellation process, despite the representative's reference to the 'clumsy and unsound' intervention and interference by the decision-maker.
15. The applicant also claims that the delegate failed to cite evidence of any incorrect answers in relation to a BVA application. However, the NOICC refers to incorrect answers given in relation to the Student visa application and does not suggest that incorrect answers were given in relation to the BVA application. Since the ground for cancellation does not arise in relation to the provision of incorrect answers given in support of a BVA application, there is

clearly no obligation to cite evidence of such answers. The NOICC specifies the ground for cancellation as the provision of bogus documents and incorrect answers in relation to the Student visa application and evidence of these has been given in the NOICC.

16. Thus, the Tribunal finds that the applicant's objections to the validity of the NOICC contained in his correspondence to the delegate of 29 December 2016 and his submissions to the Tribunal are groundless. The Tribunal finds that the notice issued under s.107 complied with the statutory requirements.

WAS THERE NON-COMPLIANCE AS DESCRIBED IN THE S.107 NOTICE?

17. The first issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice. The non-compliance identified and particularised in the s.107 notice was non-compliance with s. 101 and s. 103 of the Act.
18. The applicant provided to the Tribunal a copy of the primary decision record, which contains the following information.
 - a. On 15 April 2013 the applicant made an application for a Class TU Student visa offshore. The applicant was required to meet cl. 572.223(1A)(c) which relates to his financial capacity to meet his living expenses in Australia. At the relevant time, the relevant costs were calculated at approximately AUD 66,000 (USD 69,000).
 - b. The applicant provided with his application a bank loan statement purportedly issued by Al Baraka Bank in Lebanon for the value of USD 72,000. The loan was issued to Hammoud Hammoud Mohammad, declared as the applicant's father. The starting date of the loan was 8 April 2013.
 - c. In his application form 157A, which the applicant signed on 8 April 2013, the applicant provided the following information
 - i. In response to Question 47 whether the applicant had sufficient funds to support his stay in Australia, the applicant stated 'yes'.
 - ii. In response to Question 49 about the amount of funds available, the applicant stated '\$69,162.72'.
 - iii. In response to Question 51 about his access to funds, the applicant stated that he had access to funds that are sufficient to meet his course fees, living costs, travel costs.
 - d. On 18 July 2013 Department received a fund sufficiency declaration signed by the applicant on 17 July 2013.
 - e. The applicant was granted the Student visa on 19 July 2013 and entered Australia holding that visa on 28 July 2013.
 - f. On 5 January 2017 Al Baraka Bank confirmed to the Department's offshore post in Beirut that the bank loan statement was not issued by them.
19. The applicant provided a written submission to the Tribunal on 28 March 2017 addressing the above information. Some of the issues raised in the applicant's submission to the Tribunal have been addressed above when addressing the information the applicant provided to the delegate. In particular, the applicant raises concerns about what he claims to

be improper and capricious the processes followed by the delegate in cancelling the visa. The Tribunal does not consider such submissions helpful. There is a valid application for review before the Tribunal and the Tribunal must review the delegate's decision, whatever the applicant believes the delegate's motivations may have been. It is not the role of this Tribunal to determine, or comment on, such motivations. If the applicant believes it was pointless for his Bridging visa to have been cancelled as he is eligible to apply for another one, the Tribunal is mindful that this is an option open to the applicant. He did choose, however, to seek review of the cancellation decision and, having made a valid application for review, the Tribunal must review the delegate's decision to cancel the applicant's visa.

20. The applicant argues that the requirements of natural justice have not been met because the delegate failed to provide the applicant with a copy of the information issued by the bank to the Department. The Tribunal notes that the procedural fairness requirements outlined in the Act do not require the delegate to provide copies of any documents or information. The applicant must be made aware of adverse information and be given an opportunity to comment. This has been done in this case. There is no requirement for actual copies of adverse materials to be supplied to the applicant. Contrary to the applicant's claim, he has been given adequate details of the adverse information and the Tribunal has formed the view that the applicant has been given sufficient details to enable him to test the evidence and to provide a meaningful response. He has done so to the delegate and the Tribunal.
21. The applicant also argues that his father took the necessary steps to obtain the documents from the bank and he acted in good faith in lodging these documents and even if the documents had been issued 'improperly' by the bank, these documents were genuine and not bogus. In his declaration to the Tribunal the applicant also states that he relied on his father's information and it was not his intention to provide false or misleading information, which he knows to be an offence. The Tribunal notes that this reasoning fails to have regard to the definition of 'bogus document' which includes documents that are counterfeit or had been altered by a person who does not have authority to do so and also includes documents that had been obtained because of a false or misleading statement, whether or not made knowingly. The latter element of the definition confirms that the applicant's knowledge about the falsity of documents is not required. Thus, even if the applicant acted in good faith (a claim on which the Tribunal makes no findings at present), that is not sufficient to establish that the document is not a bogus document if such a document otherwise falls within the definition of a bogus document.
22. In oral evidence to the Tribunal the applicant stated that when he wanted to study in Australia, they saw an education agent who told them what papers were required. The applicant said that in the last minute the agent told them that he needed a bank guarantee and the agent took him to the bank to arrange a loan. The applicant said that his father went to the bank and arranged all the papers but they did not even see the papers from the bank.
23. The applicant argues that his father's action in bringing the court case against the bank challenges the delegate's finding that the applicant made a deliberate attempt to circumvent the Australian legal framework. The Tribunal is not convinced that this is so. The father's actions appear to have been taken in response to the issues that have arisen in relation to the applicant's visa. The father's actions may have been taken because the father genuinely believes the bank made a mistake or acted improperly or because the applicant or his father believe it would assist with the visa processes. Contrary to the applicant's submission, the mere fact that the father had taken action against the bank does not in itself, counter the information obtained as a result of the DIBP inquiries. The applicant's oral evidence to the Tribunal is that his father has been threatened and has dropped the court case. The fact that the court case was dropped immediately after the documents about the court case were prepared and presented to the Tribunal suggests that there was never a genuine intention of pursuing the court case. The Tribunal is not satisfied that the commencement of the court

case against the bank or the education agent is probative evidence of the applicant's or his father's lack of involvement in the provision of bogus documents, as the applicant suggests.

24. The Tribunal has considered the declaration made by the applicant's father, which he presented to the Tribunal. Mr Hammoud outlined the steps he took to obtain the bank loan, stating he did not withdraw the amount as he had cash savings and he was 'shocked' when told the papers were not genuine. Mr Hammoud states it is the responsibility of the owner of the education agency and the bank employee and he may prosecute them. Mr Hammoud states that it was not the applicant's fault. The applicant presented to the Tribunal evidence that this father is taking court action in relation to the loan. The Tribunal does not consider it necessary, for the purpose of establishing the breach, to consider how the documents were obtained. As noted above, a document may be a bogus document even if based on false or misleading statement, whether or not made knowingly. A document may also be a bogus document if altered by a person without authority, not necessarily by the applicant or with the applicant's knowledge or consent. That is, the definition of the bogus document does not require a determination of the applicant's involvement in obtaining bogus documents. While it may be relevant to the exercise of discretion, it is not relevant to the establishment of the breach.
25. The applicant presented to the Tribunal a further statement from Al Baraka bank stating that the earlier bank loan document was genuine. However, since the delegate's inquiries showed that the initial documents from the bank were not issued by the bank, the Tribunal considers a further statement from the same bank not to be probative. The applicant confirmed that this was the statement issued in June 2015 which the Department found was in itself a bogus document. The Tribunal gives it no weight.
26. The Tribunal questioned the applicant whether there was any contemporaneous evidence of the loan repayments. The applicant presented to the Tribunal a copy a payment schedule purportedly issued by the bank, as evidence of his father's repayments. He said this document was previously submitted to the Department. The Tribunal notes that the document has a spelling error in the header, which would suggest that it is not a genuine document. The applicant claims it is a translation but that is not stated on the document itself. Even if it was a genuine document, the document is nothing but a schedule prepared by the bank specifying the necessary repayments. It does not show that the money was in fact transferred between accounts or that the repayments were made in accordance with the schedule. In the Tribunal's view, if the applicant's father did transfer the money into the bank to repay the loan or the interest, documentary evidence of such transfers should be readily available.
27. The department's inquiries with the bank indicate that the bank loan statement which the applicant submitted with his Student visa application was not issued by the bank. The Tribunal considers the information obtained by the Department to be probative. Having regard to that evidence, and while acknowledging the applicant's and his father's explanations, the Tribunal finds that the bank loan papers were 'bogus documents' within the meaning of s. 5(a) or (b) of the Act.
28. The Tribunal finds that the applicant gave, presented or provided to an officer, a bogus document, being bank loan papers, in relation to his Student visa application, or caused such document to be so given, presented or provided. The Tribunal finds that the applicant breached s. 103 of the Act in relation to his Student visa application made in April 2013. The Tribunal further finds that by referring to the funds available through the bank loan in his Student visa application form, the applicant provided incorrect answers on the application form and breached s. 101 of the Act. The Tribunal finds that there is non-compliance in the way described in the Notice.

SHOULD THE VISA BE CANCELLED?

29. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
30. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

THE CORRECT INFORMATION

31. The correct information is that the applicant did not have funds, or access to funds, through the bank loan at Al Baraka Bank, to which he referred in his Student visa application form. The Tribunal acknowledges the evidence of the applicant's father that he had sufficient savings to support the applicant's study in Australia but the Tribunal is mindful that in the application form the applicant relied on the bank loan and not his father's savings.

THE CONTENT OF THE GENUINE DOCUMENT (IF ANY)

32. The Departmental inquiries indicate that the loan document purportedly from Al Baraka bank was a bogus document. A genuine document would not evidence the loan purportedly given to the applicant's father to support the applicant's study in Australia. The applicant claims that they did approach the bank

WHETHER THE DECISION TO GRANT A VISA OR IMMIGRATION CLEAR THE VISA HOLDER WAS BASED, WHOLLY OR PARTLY, ON INCORRECT INFORMATION OR A BOGUS DOCUMENT

33. The decision to grant the applicant the Bridging A visa was not dependent on the validity of his previously held Student visa or the applicant's ability to meet the requirements for the grant of the previously held Student visa. There is nothing to suggest that his application for the new Student visa was invalid. Having made a valid application for a Student visa, the applicant may have been entitled to be granted the Bridging visa irrespective of any non-compliance that may have occurred in the past or the applicant's ability to meet the requirements for the grant of the Student visa.

THE CIRCUMSTANCES IN WHICH THE NON-COMPLIANCE OCCURRED

34. The applicant provided with his Student visa application a loan document which was found to be a bogus document. The applicant and his father deny having provided bogus documents. The applicant and his father provided statements explaining the steps that were taken in obtaining the loan. The father suggests in his declaration to the Tribunal that the bank employee or the education agency employee may have been done something improperly but neither he nor the applicant had any involvement in the matter.

THE PRESENT CIRCUMSTANCES OF THE VISA HOLDER

35. The applicant is presently undertaking a course of study in Australia. He has made an application for a further Student visa. His evidence to the Tribunal is that this application remains outstanding. The Tribunal is mindful that the assessment of the new Student visa application is entirely independent of the present cancellation process and the decision to grant or not to grant him a Student visa will not be affected by the outcome of this review.

36. The applicant told the Tribunal that he has completed an Advanced Diploma in Electrical Engineering and has completed a carpentry course and is now doing a Building and Construction course at TAFE which he will complete in about two months. He plans to obtain work experience and then return to Lebanon.
37. The applicant has an outstanding application before the Tribunal relating to the refusal of his Student visa.

THE SUBSEQUENT BEHAVIOUR OF THE VISA HOLDER CONCERNING HIS OR HER OBLIGATIONS UNDER SUBDIVISION C OF DIVISION 3 OF PART 2 OF THE ACT

38. According to the primary decision record, the delegate assessing the applicant's new Student visa application sent him a letter seeking his comments on the above information. The applicant replied by providing a declaration from his father dated 5 September 2016 in which he states that he had applied legally and officially through an education agency for the bank loan and had signed all the necessary documents. The applicant also submitted an uncertified letter from Al Baraka Bank dated 23 June 2016 which refers to the applicant's father having applied for a loan in 2013 and having repaid the loan within two weeks. The decision record states that on 5 January 2017 the Department confirmed that the letter from Al Baraka bank was also a bogus document and was not issued by the bank.
39. The applicant told the Tribunal that when the issue of bogus documents was first raised, his father approached the agent again and the agent arranged the letter from the bank. The applicant claims he was unaware that the document was a bogus document

ANY OTHER INSTANCES OF NON-COMPLIANCE BY THE VISA HOLDER KNOWN TO THE MINISTER

40. There are no other known instances of non-compliance.

THE TIME THAT HAS ELAPSED SINCE THE NON-COMPLIANCE

41. The application for the visa was made in April 2013. Four years has passed since the non-compliance.

ANY BREACHES OF THE LAW SINCE THE NON-COMPLIANCE AND THE SERIOUSNESS OF THOSE BREACHES

42. There are no other known breaches of the law by the applicant.

ANY CONTRIBUTION MADE BY THE HOLDER TO THE COMMUNITY.

43. There is no evidence that the applicant has made any contribution to the community.
44. Whilst these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers'.

WHETHER THERE ARE PERSONS IN AUSTRALIA WHOSE VISA WOULD, OR MAY, BE AUTOMATICALLY CANCELLED UNDER S.140 OF THE ACT

45. There are no persons in Australia whose visa would, or may, be automatically cancelled under s.140 of the Act

WHETHER THE VISA CANCELLATION MAY RESULT IN AUSTRALIA BREACHING ITS INTERNATIONAL OBLIGATIONS.

46. There is no evidence that the visa cancellation may result in Australia breaching its international obligations. In particular, there are no children who would be affected by the cancellation and there is nothing to suggest that that Australia's non-refoulement obligations would be breached as a result of the cancellation. The Tribunal notes that the cancellation affects the bridging visa only and, as noted above, would not affect the processing of the applicant's Student visa application. There is no suggestion that the applicant would be required to leave Australia before his Student visa application is resolved. The cancellation or otherwise of the BVA is likely to have little practical consequence in relation to Australia's international obligations.

WHETHER THERE ARE MANDATORY LEGAL CONSEQUENCES TO A CANCELLATION DECISION

47. If the applicant's bridging visa is cancelled and he is not granted any other visa, the applicant may become an unlawful non-citizen and may be subject to detention and removal from Australia. The applicant may be entitled to seek another bridging visa while he has an application for review before the Tribunal.
48. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal has found that there are grounds for cancelling the bridging visa because the applicant had given, or caused to be given, bogus documents relating to the bank loan from the Al Baraka bank in support of his Student visa application made in 2013, in breach of s. 103 of the Act. The Tribunal has found that the applicant gave incorrect answers in relation to his reliance on such a bank loan in support of his Student visa application, in breach of s. 101 of the Act. The Tribunal acknowledges the applicant's claims that he and his father were unaware of the documents being bogus documents, as these were arranged by an education agent but the Tribunal has found the applicant's claims unpersuasive because the applicant has not presented probative contemporaneous evidence of the loan repayments, because the repayment schedule he presented itself appears to be a bogus document and because the court case which the applicant claims was initiated to clear his name was dropped immediately after the applicant was able to obtain documents to present to the Tribunal. However, it is not necessary for the Tribunal to make a positive finding on whether the applicant or his father had been involved in the preparation of the bogus documents or had knowledge of it. For the reasons stated above, the Tribunal has formed the view that the breach of s. 101 and s. 103 occurred and that in itself is sufficient to establish the ground for cancellation.
49. In exercising discretion, the Tribunal acknowledges that the applicant continues to pursue his studies in Australia and is fulfilling the purpose of his entry to, and stay in, Australia. The Tribunal places weight on the fact that the decision to grant the bridging visa was not in any way dependent on the provision of bogus documents or incorrect answers in support of the previously held Student visa. The Tribunal finds that the applicant was entitled to the Bridging A visa because he had made a valid application for a Student visa and his entitlement to be granted the Bridging A visa is not dependent on the outcome of that application. In the Tribunal's view, that outweighs other considerations.
50. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should not be cancelled.

DECISION

51. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 010 (Bridging A) visa.

52.

Kira Raif
Senior Member